NO. 76-678

Supreme Court, U. S.
FILED
MAY 6 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

A. The Facts 3

B. District Court Proceedings 8

C. The Court of Appeals Opinion 12

Summary of Argument 14

Argument 18

I. Congress intended that Section 626(d) be strictly adhered to by the judiciary. 18

A. The clear and unambiguous language of Section 626(d) must be given effect according to its plain and obvious meaning. 19

B. The legislative history of Section 626(d) supports a strict construction of the statute. 22

C. The weight of authority establishes that the 180-day limitation period is jurisdictional and should not be suspended by the equitable doctrine of tolling. 30

II. There is no compelling reason to engraft exceptions onto Section 626(d). 36

A. Fundamental principles of equity bar tolling where a plaintiff misses time limitations through simple ignorance of the law. 37

B. Legal precedent establishes that a limitations period is not tolled through the use of separate, alternative remedies. 44

Page

C. The weight of authority establishes that a limitations period may not be tolled where alternative actions by a plaintiff fail to convey proper statutory notice of suit. 48

III. Courts of Appeal are prohibited from substituting their judgment for the equitable discretion of a District Court. 55

Conclusion 58

Appendix A: Text of Section 626(d), contained in S. 830, as reported out by committee, 113, Cong. Rec., 31248, 31249 59

Appendix B: Text of Section 626(d), contained in H.R. 13054, as reported out by committee, 113 Cong. Rec., 34739 60

Appendix C: Text of Senate amendments to S. 830, after initial passage by the House, 113 Cong. Rec. 35055 61

Appendix D: Text of Section 7 of Proposed Amendments by Senator Javits to S. 830, while in committee, 113 Cong. Rec. 7077 63

TABLE OF CASES

Page

Acford v. Exxon Corp., ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. (1975) 35, 52

Amy v. Watertown, 130 U.S. 320 (1889) 20

Balc v. Steelworkers, Local 13263, ___ F. Supp. ___, 6 FEP Cases 824 (W.D. Pa. 1973) 35

Bank of State of Alabama v. Dalton, 50 U.S. 249 (1849) 19

Berry v. Crocker National Bank, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976) 35, 52

Bishop v. Jelleff Associates, Inc., 398 F. Supp. 579 (D.D.C. 1974) 38

Blankenship v. Ralston Purina Co., 62 F.R.D. 35 (N.D. Ga. 1973) 35

Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974) 54

Brohl v. Singer Co., 407 F. Supp. 936, (M.D. Fla. 1976) 35

Burgett v. Cudahy Co., 361 F. Supp. 617 (D.C. Kan. 1973) 35

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 11, 17, 36, 48, 49, 54

Burns v. U.S., 287 U.S. 216 (1932) 56

Caminetti v. U.S. 242 U.S. 470 (1917) 19

Cato v. South Atlantic & Gulf Coast Dist. of Intl. Longshmn. Assn., 364 F. Supp. 489, at 493 (S.D. Tex. 1973) 39

Cochran v. Ortho Pharmaceutical Co., 376 F. Supp. 302 (E.D. La. 1971) 35

Comacho v. U.S., 494 F.2d 1363, at 1369 (Ct. Cl. 1974) 45

Page

Edwards v. Kaiser Aluminum & Chemical Sales Corp.,
515 F.2d 1195 (5th Cir. 1975) 33, 35, 39, 52

EEOC v. Hickey-Mitchell Co.,
507 F.2d 944 (8th Cir. 1974) 27

Eklund v. Lubrizol Corp.,
529 F.2d 247 (6th Cir. 1976) 34, 35

Electrical Workers v. Robbins & Myers, Inc.,
___ U.S. ___, 97 S. Ct. 441
(1976) 21, 31, 42, 45, 46, 47, 49

Ex Parte Collett, 337 U.S. 55, at 61 (1949) 22

Fox v. Abel, 2 Conn. 541 21

Gebhard v. GAF Corp.,
59 F.R.D. 504 (D.C. D.C. 1973) 35

Gemsco, Inc. v. Walling,
324 U.S. 244, at 260 (1945) 22

Glus v. Brooklyn Eastern District Terminal,
359 U.S. 231 (1959) 32, 38

Goodman v. Heublein, Inc., ___ F. Supp. ___,
13 FEP Cases 26 (D.C. Conn. 1976) 35, 52

Gordon v. Kimmell, 99 U.S. 201 (1878) 42

Griggs v. Duke Power Co.,
401 U.S. 424, at 435 (1971) 53

Grossfield v. W.B. Saunders Co., ___ F. Supp. ___,
1 FEP Cases 624 (S.D. N.Y. 1968) 35, 52

Hardt v. Heidweyer, 152 U.S. 547 (1894) 42, 43

Hayes v. Southern Pacific Co., ___ F. Supp. ___,
13 FEP Cases 753 (C.D. Cal. 1976) 35

Hays v. Republic Steel Corp.,
531 F.2d 1307, at 1312 (5th Cir. 1976) 33, 35, 52

Hinton v. CPC International, Inc.,
520 F.2d 1312 (8th Cir. 1975) 31, 32

Page

Hiscott v. General Electric Co.,
521 F.2d 632 (6th Cir. 1975) 34, 35, 52

Hodgson v. Square D Co.,
459 F.2d 805 (6th Cir. 1972) 39

Hughes v. Beaunit Corp., ___ F. Supp. ___,
12 FEP Cases 1564 (E.D. Tenn. 1976) 35, 52

Johnson v. Railway Express Agency, Inc.
421 U.S. 454 (1975) 45, 46, 49

Kavanagh v. Noble, 332 U.S. 535, at 539 (1947) ..22, 31

Kennedy v. Greene, 3 Myl. & K. 722 41

Langnes v. Green, 282 U.S. 531, at 541 (1931) 56

Lemon v. Kurtzman, 411 U.S. 192 (1973) 56

M'Iver v. Ragan, 2 Wheat. 25, 4 L. Ed. 175 (1817) ...37

McCrickard v. Acme Visible Records, Inc.,
409 F. Supp. 341, (W.D. Va. 1976) 35

Mizugachi v. Molokai Electric Co.,
411 F. Supp. 590, (D.C. Haw. 1976) 35

Moses v. Falstaff Brewing Corp.,
525 F.2d 92 (8th Cir. 1975) 32, 35

North Laramie Land Co. v. Hoffman,
268 U.S. 276, at 283 (1925) 40

O'Callahan v. U.S., 451 F.2d 1390 (Ct. Cl. 1971) 45

Oshiro v. Pan American World Airways, Inc.,
387 F. Supp. 80 (D.C. Haw. 1974) 35

Ott v. Midland-Ross Corp.,
523 F.2d 1367 (6th Cir. 1975) 32, 35

Powell v. Southwestern Bell Telephone Co.,
494 F.2d 485 (5th Cir. 1974) 32, 35, 48, 51

Price v. Maryland Casualty Co.,
62 F.R.D. 614 (D.C. S.D. 1974) 35

Page

Raynor v. Great Atlantic & Pacific Tea Co.,
400 F. Supp. 357 (E.D. Va. 1975) 35

Reeb v. Equal Opportunity Atlanta,
516 F.2d 924 (5th Cir. 1974) 38

Shandelman v. Schuman,
92 F. Supp. 334 (E.D. Pa. 1950) 47

Soriano v. U.S., 352 U.S. 270 (1957) 45

Stearns v. Page, 7 How.
819, 48 U.S. 418 (1848) 42, 43

Steel Improvement & Forge Co. v. U.S.,
355 F.2d 627 (Ct. Cl. 1966) 45

Swann v. Charlotte-Mechlenberg Bd. of Educ.,
402 U.S. 1 (1971) 56

U.S. v. Lombardo, 241 U.S. 73 (1916) 20

U.S. v. National Assn. of Real Estate Bds.,
339 U.S. 485, at 495 (1950) 56, 57

U.S. v. Oregon State Med. Soc.,
343 U.S. 326 (1952) 56

U.S. ex rel. Texas Portland Cement Co. v. McCord,
233 U.S. 157 (1914) 31

Vaughn v. Chrysler Corp.,
382 F. Supp. 143 (E.D. Mich. 1974) 35

Willard v. Wood, 164 U.S. 502 at 523 (1896) 40

Wood v. Carpenter,
101 U.S. 135, at 141 (1879) 41, 42, 43

Woodburn v. LTV Aerospace, Inc.,
531 F.2d 750, (5th Cir. 1976) 35

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100, at 123 (1969) 56

STATUTES

Page

28 U.S.C. § 1254(1) 2

29 U.S.C. §§ 216, 255, 259, 626 ..... 2, 3, 8, 9
14, 15, 16, 17, 18, 21, 22, 26, 27, 28, 29, 30, 31
32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 46, 47, 50
51, 52, 53, 54, 55

42 U.S.C. § 1981 ..... 45, 46

42 U.S.C. § 2000e-14, P.L. 89-601, 80 Stat. 845 23

OTHER AUTHORITIES

Senate Bill 830 ..... 23, 24, 25

H.R. 4221, 13054 ..... 23, 24, 25

S. Rep. No. 723, 90th Cong., 1st Sess.,
pp. 1, 2, 5 (1967) 23, 24

H.R. Rep. No. 805, 90th Cong., 1st Sess.
pp. 1, 2, 5 (1967) 23, 24

Remarks of Sen. Javits, 113 Cong. Rec. 7076 (1967) .. 23

113 Cong. Rec. 3337, 3466, 31248-31257, 7077,
34738-34755, 35056,
35057, 35132 ..... 23, 24, 25, 26, 29, 47

Developments In The Law, Statutes of Limitations,
63 Harv. L. Rev. 1177,
at 1186-1190, 1220 (1950) 31, 37, 43

1 J. Story, Equity Jurisprudence 136 (11th Ed. 1873),
108, 109, 856 ..... 37, 40, 41

FEP Manual 401:5213 53

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 539 F.2d 1256, (A. 26-36).[1] The Order of the Court of Appeals denying the Petition for Rehearing is not reported (A. 37). The opinion of the District Court is not officially

[1] References to the Appendix are designated as (A. (page)).

reported, but is unofficially reported at 10 FEP Cases 844 (N.D. Okla. 1975) (A. 10-25).

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1976. A timely petition for rehearing was denied on August 19, 1976, and the petition for certiorari was filed on November 15, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether timely compliance with the notice-of-intent-to-sue requirement of 29 U.S.C. § 626(d) is a substantive jurisdictional prerequisite to suit.
2. Whether the time for compliance with the Section 626(d) jurisdictional prerequisite may not be judicially extended under circumstances which would not toll an ordinary statute of limitations.
3. Whether the Court of Appeals improperly intruded upon the discretionary powers of the District Court, by overturning its finding that the relative equities did not warrant any tolling of the Section 626(d) limitations period.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626(d) of the Age Discrimination In Employ-

ment Act (29 U.S.C. § 626(d)). The text of that statute is set forth below:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

A. THE FACTS

The Respondent, Mrs. Dartt, was employed by the Petitioner, Shell Oil Company, on January 3, 1966, at which time she was forty-four years old (A. 2, 4). Mrs. Dartt was terminated on July 31, 1973, and was fifty-one years old at the time of her termination (A. 2, 46).

Mrs. Dartt believed that her termination was due to her age (A. 46, 47), and she immediately contacted an

attorney who was a member of a club to which she belonged (A. 48). This attorney referred her to another attorney, who advised Mrs. Dartt that she "needed to file with the Federal Wage and Hour people and not with an attorney at that time." (A. 48).

Mrs. Dartt then decided to go to the U.S. Department of Labor, Wage and Hour Division, to register her complaint (A. 42). Her stated reason for so doing was:

> I thought that the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney. (A. 44).

Mrs. Dartt met with J. Dean Speer, Assistant Area Director of the local Wage and Hour Office on August 9, 1973, at which time she registered an oral complaint of age discrimination (A. 42, 53). Mr. Speer contacted Shell officials shortly thereafter, and advised them that Mrs. Dartt had made a complaint, but had not filed a Notice of Intent to Sue (A. 50).

Mr. Speer conducted a preliminary investigation of the allegations by Mrs. Dartt during September and October of 1973 (A. 77, 81). After deciding that the complaint had possible merit, Mr. Speer had a meeting with Shell officials to determine whether Shell wished to explore possible settlement or respond to the allegations of the

charge (A. 77, 81, 82). Shell advised Mr. Speer that it would get back to Mr. Speer on its position (A. 82).

On November 27, 1973, Shell wrote to Mr. Speer and advised him that it believed that Mrs. Dartt was lawfully terminated and that it was, therefore, not interested in exploring settlement at that time (A. 77, 82). Shell then agreed to undertake the compilation of voluminous statistical data on its "employment, transfer, promotion, and performance appraisal policies and practices." (A. 55, 77, 82). Mr. Speer had previously told Shell officials that these compilations would be necessary if the case was not settled (A. 55, 82).

During the time that Shell and the Department of Labor were engaging in these preliminary discussions, Mrs. Dartt telephoned Mr. Speer on two or more occasions to check on the status of her case (A. 77). Mr. Speer advised Mrs. Dartt that the investigation might take as long as a year, but that he was working on the case and would let her know about any developments (A. 43).

After the November 27, 1973, letter, Shell proceeded with the compilations, and contacted Mr. Speer on February 25, 1974, to advise him that progress was being made on the compilations, which would be completed as soon as possible (A. 82). While Shell was engaging in making these compilations, Mrs. Dartt contacted Mr. Speer on three more occasions to inquire as to the status of her case (A. 78). Mr. Speer continued to advise her that he was working

on her case, but that the investigation had not been completed (A. 43).

During this seven month period, in which Mrs. Dartt had at least six contacts with Mr. Speer, she never made any inquiry as to what her rights were under the A.D.E.A. (A. 49). She never asked any questions as to the necessary procedures for protecting her rights under the Act, nor did she inquire as to whether she could dispense with the efforts of the Department of Labor and bring her own suit (A. 49). According to Mrs. Dartt:

> Since he [Mr. Speer] told me it might take a year for his investigation, I didn't worry about it. I didn't even try to find out anything else (A. 47).

Mr. Speer treated the oral complaint by Mrs. Dartt as a request to activate the investigative efforts of the Department of Labor on her behalf (A. 53-57). He did not consider her oral complaint to be a Notice of Intent to Sue (A. 57, 65), and did not so treat it during his processing of her complaint (A. 53-55, 69).

On March 5, 1974, Mr. Speer wrote a letter to Mrs. Dartt, which stated that there would be a delay in completing the investigation and advising Mrs. Dartt that:

> In view of this delay and to avoid any misunderstanding, your attention is again called to page 4 of the enclosed pamphlet. As you will note, there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit. The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit (A. 69).

Page 4 of the enclosed pamphlet set forth the fact that a Notice of Intent to Sue had to be filed within 180 days after the alleged unlawful practice occured (A. 74). Mrs. Dartt testified that, when she received the letter, this was the first time that she became aware of the Notice of Intent to Sue requirement (A. 41). Mr. Speer testified that he did not remember whether or not he had informed Mrs. Dartt of the Notice requirement, but that it was his usual practice to inform complainants about it. He admitted that he might have forgotten to inform Mrs. Dartt of the requirement in his haste to see if the charge could be resolved (A. 63).

Mrs. Dart then contacted her present attorney, who advised her that she had missed the time limit, but that a Notice should be filed because she was not "aware of what was going on." (A. 45). A Notice of Intent to Sue was thereafter filed by Mrs. Dartt on or about March 14, 1974 (A. 7). This Notice was filed 216 days after the allegedly unlawful termination of Mrs. Dartt. At the subsequent hearings held on the Motion to Dismiss filed by Shell, counsel for Mrs. Dartt stipulated that Mrs. Dartt was not relying on her prior oral complaint as fulfilling the Notice of Intent to Sue requirement (A. 38-39, 51, 52).

Mr. Speer received the Notice and processed it, becaue he had been given instructions not to take any position on timeliness (A. 66). He contacted Shell officials and actively pursued the possibility of settlement (A. 55, 82-83).

These conciliation efforts proved unsuccessful, and Mr. Speer so notified Mrs. Dartt (A. 55).

On May 21, 1974, Mrs. Dartt filed suit against Shell, pursuant to the A.D.E.A. provisions making it unlawful to discriminate against employees aged 40 to 65 because of their age (A. 2-7). In the meantime, the Department of Labor kept its investigation on Mrs. Dartt open, but in abeyance, due to the pending litigation by Mrs. Dartt (A. 55, 67).

B. DISTRICT COURT PROCEEDINGS

Shell moved to dismiss the suit by Mrs. Dartt on the grounds that Mrs. Dartt had failed to state a claim upon which relief could be granted, because it appeared on the face of her complaint that she had not timely complied with the Notice of Intent to Sue requirement of Section 626(d) (1) (A. 8-9). Mrs. Dartt responded by arguing that the Section 626(d) requirement was merely directory, and not jurisdictional; that her oral complaint satisfied the Section 626(d) requirement; and that, if her oral complaint did not satisfy the requirement, the requirement should be tolled due to the failure of the Department of Labor to inform her of the requirement.

The District Court held two evidentiary hearings in order to develop the facts material to the jurisdictional challenge. After the conclusion of these hearings, the District Court issued an opinion, holding that timely com-

pliance with the notice requirement was a "jurisdictional prerequisite" to the maintenance of a private suit under the A.D.E.A. (A. 13-15). The Court noted that the use by Congress of the mandatory word "shall" evidenced a clear Congressional intent that timely compliance with Section 626(d) was an essential precondition to suit (A. 14). The Court observed that the statutory language was plain and unambiguous, and held that "it must be given effect according to its plain and obvious meaning." (A. 15).

The District Court further held that the oral complaint by Mrs. Dartt to the Department of Labor did not satisfy the Section 626(d) requirement (A. 15-18). The Court noted that, under the original House-passed bill, there was no 180-day requirement. However, the original Senate version contained such a 180-day requirement, and the Senate restored that requirement when it considered the House-passed version (A. 17). The District Court concluded that the legislative history indicated that Congress attached "significant importance" to compliance with the 180-day requirement (A. 18). The District Court further found that, under the statutory procedures of the Act, mere use of the investigative aid of the Department of Labor by Mrs. Dartt would not reasonably put Shell or the Department on notice that she intended to bring a private suit (A. 17). According to the Court:

> It does not appear that under the provisions of these statutes the commencement of an investigation by the

> Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that a mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. § 626 (d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination (A. 17).

Finally, the District Court held that the failure of the Department of Labor to inform Mrs. Dartt of the notice requirement when she registered her oral complaint did not toll the time for compliance with the notice requirement. The Court premised its holding on three separate grounds.

The first basis for this holding was that Mrs. Dartt was not excusably ignorant of the notice requirement. The Court found that Mrs. Dartt was charged with presumptive knowledge of the statute (A. 19, 23). In addition, the Court found that she had constructive knowledge of the statute from the posters displayed by Shell on its bulletin boards, and was possessed with enough information to cause a reasonable person to inquire as to their rights (A. 19, 23; 68). Finally, the Court found that the failure of the Department of Labor to inform Mrs. Dartt of the notice requirement did not prevent her from fulfilling the requirement (A. 23). In the view of the Court, the Department of Labor had no statutory duty to inform Mrs. Dartt of the notice requirement, and its failure to do so did not relieve Mrs. Dartt of

the duty to make a reasonable inquiry as to what was necessary to preserve her rights (A. 23).

The second basis for this holding was that the use by Mrs. Dartt of the administrative complaint procedures under the A.D.E.A. was permissive (A. 19). The Court held that Mrs. Dartt could not rely on her use of a permissive administrative remedy to toll the time limits of Section 626(d), especially where her use of that remedy did not put Shell on notice that she intended to pursue another, independent remedy (A. 19-23). The Court rejected the argument by Mrs. Dartt that her oral complaint gave Shell sufficient notice to bring her action within the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965), stating:

> The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case (A. 23).

The third basis relied upon by the Court in refusing to toll the notice requirement was that Mrs. Dartt had failed to show that the relative equities were clearly in her favor (A. 23). The Court found that the strong remedial policies underlying the A.D.E.A. were equally balanced by the strong Congressional intent that employers receive a clear and timely notice that they will be sued (A. 23). Because

one statutory purpose did not outweigh the other, the Court held that the balance could not be tipped by Mrs. Dartt if her actions would not have tolled a statute of limitations in a parallel situation (A. 23).

The Court found that the facts warranted a conclusion that Mrs. Dartt was not excusably ignorant of the requirement, and that insufficient equities existed to warrant a tolling, particularly as Mrs. Dartt would not be left without a remedy (A. 23). The Court noted that Mrs. Dartt could still obtain relief through the Department of Labor, and held that it would be "just" to leave her to the remedy which she had elected to pursue (A. 23).

As a result, the District Court entered an Order on February 6, 1975, dismissing the action for lack of subject matter jurisdiction, and Mrs. Dartt took a timely appeal from that Order.

C. THE COURT OF APPEALS OPINION

On July 22, 1976, the Court of Appeals reversed the dismissal of the action, and remanded the case for trial. The Court of Appeals agreed with the District Court that the oral complaint by Mrs. Dartt did not satisfy the notice requirement (A. 29). The Court of Appeals further agreed with the District Court that timely compliance with the notice requirement should not be excused, absent clear equities in favor of Mrs. Dartt (A. 33). However, the Court of Appeals disagreed with the conclusion by the District

Court that the relative equities did not warrant any tolling of the notice requirement (A. 33).

The Court of Appeals acknowledged that one of the basic purposes of the Section 626(d) requirement is "to give early notice to the employer of a possible lawsuit." (A. 35). However, the Court of Appeals believed that the "*de facto*" purpose of the statute was fulfilled by the oral complaint registered by Mrs. Dartt, because this oral complaint gave Shell "early notification of Dartt's allegations." (A. 35). The Court of Appeals viewed as immaterial the fact that not only did the oral complaint never contain any mention of a possible private suit, but also the fact that the Department of Labor told Shell that no Notice of Intent to Sue had been filed by Mrs. Dartt.

Finding that early notification of allegations of age discrimination (without any early notice of possible suit) was sufficient to satisfy the Congressional purpose behind Section 626(d), the Court of Appeals then listed several other equitable factors which, in its view, supported an equitable tolling of the notice requirement. These included the fact that Mrs. Dartt promptly sought legal advice from two attorneys and followed it (A. 36); the fact that the Department of Labor failed to tell Mrs. Dartt about the notice requirement (A. 35);[2] the fact that Shell allegedly indirectly contributed to the failure of Mr. Speer to

[2] The Court of Appeals acknowledged that there was no statutory duty to do so (A. 35).

tell Mrs. Dartt about the requirement (A. 35);[3] and the fact that Mrs. Dartt checked on the status of her complaint about once per month (A. 34).

The Court of Appeals rejected the finding of the District Court that Mrs. Dartt had both presumptive and constructive knowledge of the Section 626(d) requirement, and likewise rejected the finding of the District Court that Mrs. Dartt had not acted reasonably in her failure to inquire into her rights. In the view of the Court of Appeals, the actions taken by Mrs. Dartt were reasonable and her ignorance of the law excusable (A. 36).

The Court of Appeals therefore found that the 180-day limit was indefinitely tolled (past the time when Mrs. Dartt consulted her first attorney and the Department of Labor and past the time when she received actual notice of the 180-day requirement) until Mrs. Dartt filed her Notice of Intent to Sue (A. 36). Shell timely sought certiorari from this Court, and certiorari was granted on February 22, 1977.

SUMMARY OF ARGUMENT

A. Congress established a comprehensive and definite

[3]The Court of Appeals seems to have inferred that Shell acted unreasonably with regard to the speed with which it completed the requested compilations. However, Mr. Speer testified that he was "awaiting the information *at the time*" he wrote Mrs. Dartt (A. 56), but he never testified that the delay in obtaining the data caused him to delay his letter to Mrs. Dartt.

scheme for the enforcement of rights under the A.D.E.A. and has defined with precision the requirements necessary for the maintenance of a private civil action. Section 626 (d) is clear and unequivocal in its specification that a Notice of Intent to Sue must be filed within one hundred and eighty days after the occurrence of the alleged unlawful practice, as a condition precedent to the maintenance of any private action. Both the language of the A.D.E.A and its legislative history demonstrate Congressional concern for a prompt and specific filing period, in order to give respondents and the Department of Labor prompt notice of possible private litigation and thereby promote effective, accelerated settlement of the claims of prospective private litigants. Congress accomplished its objectives by enactment of the 180-day Notice requirement, and made it clear that alternative actions by a plaintiff which failed to convey any notice of intent to maintain a private suit could neither fulfill this requirement nor extend the time for fulfilling the requirement. Because timely compliance with the Section 626(d) Notice requirement is a substantive jurisdictional prerequisite, the time for compliance with that requirement may not be judicially extended through the use of the doctrine of equitable tolling.

B. Legal precedent does not support the engrafting of exceptions upon the 180-day Notice requirement for plaintiffs who register oral complaints with the Department of Labor within the 180-day period. Assuming *arguendo* that

Section 626(d) is analogous to a statute of limitations, the equitable doctrine of tolling provides no basis for allowance of tolling under the circumstances presented in the instant case. The equitable doctrine of tolling was developed in order to avoid injustice in circumstances where a person is prevented from exercising his rights, through no fault of his own, due to actions by the defendant; or, a recognized legal disability; or by operation of law. At no time in the case at bar was Mrs. Dartt prevented or hindered in any way by Shell Oil Company from timely filing her Notice of Intent to Sue. Her ignorance of the law is no excuse, because she is undisputedly a person of ordinary mental capacity, suffering under no legal disability which would render her incompetent to protect or assert her own rights. Established legal principles charge her with presumptive knowledge of the contents of the statutes, and require her to take reasonable steps to inquire into and protect those rights. Her failure to take the necessary steps to protect her rights must be held to be fatal to her action.

Furthermore, Mrs. Dartt was not prevented by operation of law from timely filing her Notice of Intent to Sue. The A.D.E.A. does not require the registering of an oral complaint with the Department of Labor as a precondition to the filing of a Notice of Intent to Sue. Persons who register such complaints are not prevented from meeting the Section 626(d) requirements during the pendency of their oral complaints. Under the enforcement scheme of

the A.D.E.A., persons are free to pursue either their administrative remedy by registering a complaint or their judicial remedy by filing a Section 626(d) notice, or both. This Court has repeatedly held that no tolling of a limitations period is warranted where a plaintiff has an unfettered right to invoke a certain remedy, but chooses not to do so while pursuing other separate remedies. Because the registering of an oral complaint is an optional A.D.E.A. remedy which does not bar timely compliance with Section 626(d), no tolling of the Section 626(d) notice period is allowable during the pendency of such complaints.

Finally, oral complaints to the Department of Labor within the limitations period are insufficient to warrant the invocation of the tolling principle enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965). The *Burnett* tolling principle is limited in application, and may only be utilized where a plaintiff gives notice to the defendant, within the time and in the manner contemplated by the statute, that suit will be maintained against it. Oral complaints are insufficient to give the notice required by Section 626(d), because such complaints neither convey the required intent to maintain a private civil action nor are they in the written form mandated by Congress. Extension of the *Burnett* tolling principle to situations where no statutory notice is given would do violence to both the rationale upon which *Burnett* is predicated and to the statutory language of Section 626(d).

C. It is the function of the district court, sitting in equity, to exercise its sound and reasoned discretion, with due regard to the law and the facts, and to fashion a just result. The Courts of Appeals are limited in their review of an exercise of discretion by a district court, and may only overturn the decision of the lower court where there has been an abuse of discretion.

The decision of the District Court was supported by both the law and the facts; it gave full effect to the statutory language of Section 626(d); it prevented prejudice to Shell and the Department of Labor due to the untimely notice; and, it left Mrs. Dartt with a Congressionally approved remedy for her alleged injury. The Court of Appeals improperly engaged in a *de novo* review of the facts of the case, and substituted its discretion for that of the District Court. This was an impermissible exercise of the power of appellate review, and must be overturned.

ARGUMENT

I.

CONGRESS INTENDED THAT SECTION 626(d) BE STRICTLY ADHERED TO BY THE JUDICIARY.

The central question presented in this case is what type of notice Congress intended to be given to a defendant in order to satisfy the requirements of Section 626(d). Companion to that issue is whether, even if the required notice is not given, alternative actions by a plaintiff may extend the time for giving the required notice.

The Court of Appeals found that the *de facto* purposes of the Notice of Intent to Sue requirement are fulfilled when a plaintiff registers an oral complaint of age discrimination with the Department of Labor within the limitations period. The Court of Appeals further found that, where the *de facto* purposes of the A.D.E.A. are fulfilled, the time limits for formal compliance with the Notice of Intent to Sue requirement may be extended indefinitely.

Shell submits that the language of the statute, its legislative history and substantial legal precedent mandate a conclusion that the *de facto* purposes of Section 626(d) can only be satisfied by an actual notice of intent to sue filed within the 180-day limitation period and that oral complaints may not extend that filing period. Failure to give such a Notice, within the time required, is fatal to the action.

A. The Clear And Unambiguous Language Of Section 626(d) Must Be Given Effect According To Its Plain And Obvious Meaning.

It is a well-settled principle of statutory construction that when statutory language is clear and unambiguous, it must be held to mean what it plainly says, because such clear statutory language is the best evidence of what the Congress intended. *Caminetti v. U.S.*, 242 U.S. 470 (1917); *Bank of State of Alabama v. Dalton*, 50 U.S. 249 (1849);

Amy v. Watertown, 130 U.S. 320 (1889); *U.S. v. Lombardo*, 241 U.S. 73 (1916).

Here, the statute clearly states that "notice of intent to file such action . . . shall be filed within one hundred and eighty days." Thus, the statute plainly requires that the notice must contain such words as to evidence a clear intention by a plaintiff to file a civil action against an identifiable defendant. Counsel for Mrs. Dartt stipulated that the oral complaint by Mrs. Dartt contained no mention of any intention to file any private civil action (A. 51, 52). An oral complaint to the Department of Labor which fails to contain any language which so indicates an intention to sue obviously cannot comply with the clear statutory language.

The statute further requires that the Notice of Intent to Sue be "filed." This Court has previously construed the word "file" as meaning the depositing of a written instrument with the government official whom Congress intended to receive such document. As this Court noted in *U.S. v. Lombardo, supra*, 241 U.S. at 76:

> The word "file" was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word "file" is derived from the Latin word "filum," and relates to the ancient practice of placing papers on a thread of wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. . . . A paper is filed when it is delivered to the proper official and by him received and filed.

The statute finally requires that this written document, evidencing an intent to sue, shall be filed with the Department of Labor within 180 days[4] after the alleged unlawful practice occurred. Here, Mrs. Dartt alleged that she was unlawfully discharged on July 31, 1973. Mrs. Dartt did not timely comply with the Section 626(d) requirement but filed her notice some thirty-six days too late. She argues that this slight delay is excusable.

However, as this Court noted in *Electrical Workers v. Robbins & Myers, Inc.*, ____ U.S. ____, 97 S. Ct. 411 (1976), with respect to a similar claim under Title VII:

> But the principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay . . . equally acceptable. In defining Title VII's jurisdictional prerequisites "with precision" [citation omitted], Congress did not leave to courts the decision as to which delays might or might not be slight. (97 S. Ct. at 448, 449)

Section 626(d) is plain and admits of no more than one meaning. It states that "No civil action may be commenced by any individual" unless a timely notice of intent to sue is filed. This Court must give its words the effect which Congress intended, and the time limits prescribed by Congress in that Section should be enforced according to

[4]The word "day" means, of course, calendar days. See, *Co. Litt.* 135; *Fox v. Abel*, 2 Conn. 541.

their expressed terms. Because Mrs. Dartt did not comply with the statutory requirements, her action was properly dismissed.

That the time period may be short is an argument not appropriately addressed to this Court. As this Court observed in another case where the plaintiff argued against the strict application of a limitations period:

> Such periods are established to cut off rights, justifiably or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary.
>
> Remedies for resulting inequities are to be provided by Congress, not the courts.[5]

B. The Legislative History Of Section 626(d) Supports A Strict Construction Of The Statute.

If the statutory language is clear and unequivocal, there is no need to refer to legislative history. Legislative history is significant only where there is ambiguity to be resolved, or where there is a need for interpretation because of an absurd or unreasonable effect by the literal words of the statute. *Ex Parte Collette*, 337 U.S. 55, at 61 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244, at 260 (1945). Although it is unnecessary to refer to legislative history, because the statutory language of Section 626(d) is conclusive and equitable in its application, an examination of the legislative history supports the conclusion that

[5] *Kavanagh v. Noble*, 332 U.S. 535, at 539 (1947).

timely compliance with its requirements is a substantive jurisdictional prerequisite to suit.

Senate Bill 830 and its companion, H.R. 4221, were initially proposed by the Johnson Administration, as a result of a study on age discrimination which had been authorized at the time Title VII was enacted into law.[6] As proposed by the Administration, these bills provided for an enforcement mechanism similar to that under the National Labor Relations Act, whereby the aggrieved person filed a charge with the agency and relied upon it to protect his or her rights.[7]

There was widespread opposition on both sides of the Congress to the establishment of a new bureaucracy, with resultant delays in case handling.[8] As a result, bills were introduced in both the House and Senate to allow direct court enforcement of the Act by both aggrieved persons and the Department of Labor, under procedures similar to those under the Fair Labor Standards Act.[9]

When reported out by the respective committees of the House and Senate, the bills (S. 830 and H.R. 13054)[10]

[6] S. REP. NO. 723, 90th Cong., 1st Sess., p. 1-2 (1967); H.R. REP. NO. 805, 90th Cong., 1st Sess. p. 1-2 (1967); 42 U.S.C. § 2000e-14, P.L. 89-601, 80 Stat. 845.

[7] S. REP. NO. 723, at p. 5; H.R. REP. NO. 805, at p. 5.

[8] Remarks of Sen. Javits, 113 CONG. REC. 7076 (1967).

[9] 113 CONG. REC. 3337, 3466, 7076.

[10] H.R. 13054 apparently was substituted for H.R. 4221 while the bills were still in Committee.

followed the general enforcement scheme of the Fair Labor Standards Act.[11] Both the House and Senate bills provided that suits could be brought by either employees or the Department of Labor to enforce the statute. Both of the bills further provided that, as a "condition precedent" to suit by an employee, the employee must first give the Secretary of Labor a notice of his intent to sue and afford the Secretary a period of 60 days to conciliate the dispute.[12]

The one major difference in the House and Senate bills was that the Senate bill required that the Notice of Intent to Sue be "filed within one hundred and eighty days after the alleged unlawful practice occurred,"[13] whereas the House bill contained no such requirement.[14] Both the House and Senate bills passed in their respective bodies in the form reported out by their committees.[15]

Immediately after its passage of H.R. 13054, the House took up for consideration S. 830, which had been previously passed by the Senate. The House amended S. 830 by substituting the language of H.R. 13054 for that adopted

[11] Compare 113 CONG. REC. 31248-31249, and 113 CONG. REC. 34738-34740, with 29 U.S.C. § 216. *See also* S. REP. NO. 723, H. REP. NO. 805 on these bills.

[12] *See* 113 CONG. REC. 31250; 113 CONG. REC. 34748, Remarks of Rep. Dent.

[13] 113 CONG. REC. 31249. (See Appendix A, hereto)

[14] 113 CONG. REC. 34739. (See Appendix B, hereto)

[15] 113 CONG. REC. 34738-34753; 113 CONG. REC. 31248-31257.

by the Senate, thereby deleting the 180-day requirement. The House bill, H.R. 13054, was then laid on the table.[16]

The House sent S. 830, as amended, back to the Senate. The Senate refused to accept the deletion of the 180-day requirement from S. 830, and amended the House-passed version of S. 830 to restore this requirement.[17] In discussing the need for the provisions deleted by the House, Senator Javits (one of the leading sponsors of the bill) stated:

> Mr. President, the substance of the amendments . . . is that they are intended to answer some of the disquiet in American business.
>
> * * *
>
> This bill, which deals with age discrimination in employment, deals with some of the concerns of American business that the legislation would be open ended. These amendments are expressly designed to fix reasonable standards for regulations . . . keeping also in mind the practical problems of administration, and will answer some of the concerns expressed about it.[18]

After restoring the 180-day requirement, the Senate sent S. 830 back to the House. The House accepted the restoration of the 180-day requirement, and passed the bill on a voice vote.[19]

[16] 113 CONG. REC. 34753-34755.

[17] 113 CONG. REC. 35057. (See Appendix C, hereto)

[18] 113 CONG. REC. 35056.

[19] 113 CONG. REC. 35132.

It is apparent that American business vigorously supported the 180-day requirement, viewing the House bill as "open ended."[20] The fact that the 180-day requirement was deleted by the House, restored by the Senate, and then accepted by the House reveals that Congress attached significant importance to the 180-day requirement. Indeed, Congress enacted only one limited exception to the 180-day requirement, allowing such period to be extended for a maximum of an additional 120 days where an individual first sought relief from a state agency which enforced a similar law against age discrimination.[21]

As finally enacted, the bill was a compromise between the initial administration bill (with no right to a private suit) and the House bill (which allowed private suits at any time within the two-year statute of limitations period upon 60 days notice to the Secretary). The final statute reveals a clear Congressional intention that the majority of age discrimination complaints would be handled by the Department of Labor. A very limited right to bring a private action was preserved only for those plaintiffs who moved quickly to bring their own lawsuits. Persons who did not act quickly to file a notice of intent to bring a private suit were left to the administrative actions of the

[20] 113 CONG. REC. 35056.

[21] See 29 U.S.C. § 626(d)(2). Oklahoma does not have any state statute prohibiting age discrimination by private employers, and the extended filing period did not apply to this case.

Department of Labor, which is under no similar 180-day requirement.

There were legitimate reasons for Congress to have so circumscribed a private right of action. It is a recognized fact in business circles that litigation, even if frivolous, is very expensive. An employer against whom an individual suit is brought under the A.D.E.A. runs the risk of incurring not only the expenses of backpay, liquidated damages, and its own litigation expenses, but also the litigation expenses of the plaintiff.[22]

When faced with definite notice of a threatened lawsuit while the total amount of backpay is still relatively small, the employer has a significant impetus to settle the case.[23] Not only will the employer be able to spend only small sums for backpay and its own attorney fees, but also the task of reinstating the complainant is made easier, as no replacement may yet have been hired,[24] and reinstatement may be less embarrassing to (and therefore less opposed by) the supervisors involved. However, as the backpay amounts grow larger through the passage of time, and

[22] 29 U.S.C. § 626(b); 29 U.S.C. § 216(b).

[23] See the analogous Title VII case of *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974), wherein the Eighth Circuit found that even the most recalcitrant employer is more likely to settle when told it will be sued. The Eighth Circuit found substantial prejudice to the employer by the failure of EEOC to timely notify it that suit was to be filed.

[24] Or, if hired, will not yet have become a familiar face in the workforce.

replacements are hired and become settled in, the employer has increasingly less impetus to settle the case. Thus, Congress had legitimate reasons for requiring prompt notice of possible private litigation, in order to promote effective settlement of such claims.

Moreover, employers obviously considered it preferable to have the Department of Labor administratively "weed out" unfounded complaints in the administrative process, as they strongly supported the short limitation period on private suits. Nowhere in the legislative history does it appear that organizations of older workers voiced opposition to this restriction of the right to a private lawsuit.[25] Congress balanced the interests of employers in being free from frivolous and expensive private litigation with the interests of some complainants in being able to privately pursue their own claims, by enacting strict limitations on the ability to bring a private suit.

As a result, the legislative history clearly supports the conclusion that Congress intended to specifically limit private suits, and to allow such suits only where the plaintiff timely complied with the requirements of Section 626 (d). Congress indicated the mandatory nature of this requirement in the opening sentence of Section 626(d), when

[25] Indeed, such organizations may have considered it preferable (for all but their most litigious members) to forego a private suit and utilize an inexpensive administrative agency to enforce their statutory rights.

it stated "No civil action may be commenced by any individual" unless a timely notice of intent to sue is filed and when it referred to this requirement as a "condition precedent" to the maintenance of a private civil action.

It is further clear, from both the statutory language and the legislative history, that a mere oral complaint of age discrimination to the Department of Labor does not satisfy the Notice of Intent to Sue requirements. Under the enforcement scheme enacted by Congress, oral complaints of age discrimination may be registered at any time within the statute of limitations period.[26] Such complaints trigger the separate investigative and administrative procedures of the Department of Labor, and are wholly unnecessary for the maintenance of a private suit. Thus, such complaints neither put the Department of Labor nor the employer on notice that a private suit is being contemplated.

An amendment was offered by Senator Javits to S. 830 which would have preserved a right of private suit simply by the registering of a complaint of age discrimination against a respondent.[27] However, that amendment never survived the Senate Committee, and was never again offered when the Senate as a whole considered S. 830. As a result, it is apparent that Congress intended that a

[26] 29 U.S.C. § 626(e) incorporates the limitations periods of the F.L.S.A., found in 29 U.S.C. § 255, which establishes a two-year limitation period (three years, if willful).

[27] 113 CONG. REC. 7077. (See Appendix D, hereto)

notice "of intent to sue" be precisely that, and not simply a charge alleging age discrimination.

Moreover, to allow indefinite tolling of the Notice requirement where an oral complaint is registered with the Department of Labor would be the equivalent of allowing a Notice of Intent to Sue to be filed at any time within the two-year statute of limitations. This approach was initially sought in the House bill, but was expressly rejected by Congress. It must likewise be rejected by this Court.

The legislative history makes it plain that timely compliance with Section 626(d) is not only mandatory, but also that the 180-day filing period may not be indefinitely extended by a mere oral complaint of age discrimination. The Court of Appeals erroneously interpreted the statute, and its decision must be reversed.

C. The Weight Of Authority Establishes That The 180-Day Limitation Period Is Jurisdictional And Should Not Be Suspended By The Equitable Doctrine Of Tolling.

At issue in the case at bar is not just a general statute of limitations, but, rather, a comprehensive statute which creates a new cause of action and which establishes a specific time limitation for the assertion of that newly-created right. It is well settled that time restrictions contained in the same statute which create the cause of

action constitute a limitation on the right itself, and are subject to a more strict construction than ordinary statutes of limitations.[28] The jurisdiction of the federal courts to hear private actions under the A.D.E.A. is derived from the statute itself, and the 180-day period for filing a notice of intent to sue is a jurisdictional prerequisite to suit.

Unlike a statute of limitations, which is subject to waiver and other equitable considerations, a jurisdictional defect cannot be waived nor can it be cured even with consent of the parties.[29] If the jurisdictional prerequisite is not met, an essential condition of liability must be found lacking and the court is deprived of subject matter jurisdiction. As was noted previously, Congress clearly indicated that timely compliance with Section 626(d) was jurisdictional when it stated that "No civil action may be commenced" unless the requirements of the section were met.

Every other circuit ruling on the issue has found that Congress intended that timely compliance with Section 626(d) be a jurisdictional prerequisite to the maintenance of a private action under the A.D.E.A., not

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[28] *U.S. ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914); *Kavanagh v. Noble*, 332 U.S. 539 (1947); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). *See also, Developments In The Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, at 1186-1190 (1950).

[29] Cf. *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975).

subject to equitable tolling principles. Thus, in *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), the Sixth Circuit expressly rejected the argument that the Section 626(d) limitations period was analogous to the F.E.L.A. statute of limitations problem presented in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Sixth Circuit pointed out that A.D.E.A. suits are governed by a separate statute of limitations set forth in 29 U.S.C. § 255, and held that, while Section 255 was governed by the *Glus* tolling principle, Section 626(d)(1) was not. The Fifth Circuit reached the identical conclusion in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), holding that timely compliance with Section 626(d) "is simply a prerequisite to the right to file any suit whatsoever under the ADEA" (494 F.2d at 487).

In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), the Eighth Circuit stated that timely compliance with Section 626(d) is a jurisdictional requirement, and indicated that it would treat untimely compliance in the same manner as it did in the Title VII case of *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). In the *Hinton* case, the plaintiff failed to file suit within 90 days after receipt of his Right-to-Sue letter from the E.E.O.C., in reliance upon the agreement of the defendant not to raise the issue of timeliness while the parties engaged in pre-suit settlement negotiations. Suit was later filed, and the district court dismissed the action *sua sponte*

for lack of jurisdiction. In spite of clear equities in the plaintiff's favor, the Eighth Circuit affirmed, holding that it could not modify a jurisdictional prerequisite upon equitable grounds.

The Fifth and Sixth Circuits have reached similar conclusions in other cases where there were equities in the favor of the plaintiff which arguably might have tolled a statute of limitations. In *Hays v. Republic Steel Corp.*, 531 F.2d 1307, at 1312 (5th Cir. 1976), the plaintiff told the Department of Labor that he intended "to do something about it," when reminded that a Notice of Intent to Sue was required and the 180 day period had almost expired. He actually prepared a written notice, but became suddenly ill and did not file his notice within the statutory period. The Fifth Circuit affirmed the dismissal of his suit, finding that his oral complaint to the Department of Labor did not equate with the filing of the Section 626(d) notice. The Court refused to modify the 180 day period, stating "This court cannot waive a limitation period established by Congress." (531 F.2d at 1312).

Similarly, in *Edwards v. Kaiser Aluminum & Chemical Sales Corp.*, 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected a claim by the plaintiff that the defendant had committed a constructive fraud by failing to post the required A.D.E.A. posters, and that the Section 626(d) requirement should be tolled due to this fraud. The Court refused to modify the 180-day limitation period, reiterating

its view that timely compliance with Section 626(d) "is simply a prerequisite to the right to file any suit whatsoever under the ADEA." (515 F.2d at 1199).

In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), the plaintiff argued that the employer had wrongfully concealed his cause of action, and that the time for filing the Section 626(d) notice was thereby tolled. The Court expressed grave doubt that any tolling of the 180-day period would be permissible, because the statute created an "imperative requirement" which was expressed in "unequivocal statutory language." (521 F.2d at 634).

Finally, in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Sixth Circuit held that the "imperative nature" of the Section 626(d) notice requirement precluded any equitable tolling of the 180-day limitations period. There, the plaintiff erroneously believed that there was an adequate state remedy available, and he attempted to pursue it. His notice of intent to sue was filed 299 days after his discharge, and would have been timely if the state remedy had been adequate. However, the Sixth Circuit found that the state law was insufficient to allow the plaintiff to invoke the 300-day notice period allowable under 29 U.S.C. § 626(d)(2). Although there were clear equities in the plaintiff's favor, the Court affirmed the dismissal of his action, finding that it could not grant equitable modifications of the 180-day limitation period.

The above cases reveal that the Tenth Circuit is alone

among the circuits in its conclusion that the Section 626(d) limitation period is subject to equitable modifications. This Court should follow the great weight of Circuit Court and District Court authority,[30] and hold that the time period set forth in Section 626(d) must be considered a substantive jurisdictional prerequisite to suit, which is not subject to equitable modifications.

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[30] *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1975); *Woodburn v. LTV Aerospace, Inc.*, 531 F.2d 750, (5th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1976); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Oshiro v. Pan American World Airways, Inc.*, 387 F. Supp. 80 (D.C. Haw. 1974); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974); *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35 (N.D. Ga. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D.C. Kan. 1973); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.C. D.C. 1973); *Price v. Maryland Casualty Co.*, 62 F.R.D. 614 (D.C. S.D. 1974); *Cochran v. Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Brohl v. Singer Co.*, 407 F. Supp. 936, (M.D. Fla. 1976); *Raynor v. Great Atlantic & Pacific Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Mizugachi v. Molokai Electric Co.*, 411 F. Supp. 590, (D.C. Haw. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Hayes v. Southern Pacific Co.*, ___ F. Supp. ___, 13 FEP Cases 753 (C.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976); *Grossfield v. W.B. Saunders Co.*, ___ F. Supp. ___, 1 FEP Cases 624 (S.D. N.Y. 1968); *Balc v Steelworkers, Local 13263*, ___ F. Supp. ___, 6 FEP Cases 824 (W.D. Pa. 1973); *McCrickard v. Acme Visible Records, Inc.*, 409 F. Supp. 341, (W.D. Va. 1976).

II.

THERE IS NO COMPELLING REASON TO ENGRAFT EXCEPTIONS ONTO SECTION 626(d).

The Court of Appeals held that the 180-day requirement was analogous to a statute of limitations, and should be liberally interpreted so as to permit tolling on equitable grounds (A. 32). In the view of the Court of Appeals, because the A.D.E.A. is remedial and humanitarian legislation, "strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights." (A. 32).

Shell submits that both the statutory language and the legislative history establish that Congress intended timely compliance with Section 626(d) to be a substantive jurisdictional prerequisite to suit, which would be tolled (if at all) only under most egregious circumstances not present here. However, even if the 180-day requirement is analogous to a statute of limitations, it is well-settled that "[t]he basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent.'" *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, at 426 (1965).

As will be discussed below, the District Court correctly found that Mrs. Dartt failed to establish facts which would even warrant the tolling of an ordinary statute of limitations (A. 23). The District Court further correctly

found that Congress could not have intended that the 180-day limitation period of Section 626(d)(1) be tolled "for any less compelling reason than would justify the tolling of a statute of limitations." (A. 23). Shell urges that substantial legal precedent requires this Court to reach the same conclusion.

A. Fundamental Principles Of Equity Bar Tolling Where A Plaintiff Misses Time Limitations Through Simple Ignorance Of The Law.

Shell urges that the jurisdictional nature of Section 626(d) requires that no equitable tolling of the requirement is permissible. However, even assuming *arguendo* that the 180-day notice requirement is analogous to a statute of limitations, Shell submits that the District Court properly found that such period should not be tolled "for any less compelling reason than would justify the tolling of a statute of limitations." (A. 23).

Here, no facts exist which would warrant the tolling of a statute of limitations in a comparable situation. The courts have been exceedingly guarded in implying exceptions to statutes of limitations,[31] and recognize only a limited class of exceptions arising from circumstances where a plaintiff has been prevented, through no fault of his own, from timely asserting his rights.[32] These excep-

[31] *M'Iver v. Ragan*, 2 Wheat. 25, 4 L. Ed. 175 (1817).

[32] *Developments In The Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, at 1220 (1950); 1 J. STORY EQUITY JURISPRUDENCE 136 (11th Ed. 1873).

tions fall into the three following categories: (1) conduct of the defendant prevented the plaintiff from acting; (2) the plaintiff was operating under some legal disability; or, (3) the plaintiff was prohibited by law from filing suit.

There is no evidence that Shell was in any way responsible for the failure of Mrs. Dartt to timely file her notice of intent to sue. Shell neither attempted to mislead Mrs. Dartt as to the time for filing her notice,[33] nor did it attempt to wrongfully conceal the existence of her cause of action.[34] Shell was not under any duty to inform Mrs. Dartt of the requirements of Section 626(d), and did all that it was legally required to do when it posted the A.D.E.A. posters[35] and cooperated in the investigation by the Department of Labor.[36] Likewise, there is no evidence that the Department of Labor wrongfully misled Mrs. Dartt

[33] Cf. *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959).

[34] Cf. *Reeb v. Equal Opportunity Atlanta,* 516 F.2d 924 (5th Cir. 1974).

[35] Cf. *Bishop v. Jelleff Associates, Inc.,* 398 F. Supp. 579 (D.D.C. 1974). Even if these posters are found to be deficient, Shell is expressly insulated from liability therefor by 29 U.S.C. § 259.

[36] The suggestion by the Tenth Circuit that Shell was deliberately stalling in furnishing the requested data finds no support in the record. Mr. Speer never testified that he thought the delay was unreasonable. In fact, there is no evidence that he even contacted Shell between the time he requested the data in November of 1973 and the time Shell telephoned him on February 25, 1974, to report on its progress (A. 82). Clearly, Mr. Speer would have pressed harder for the data, or even subpoenaed it, if the delay were unjustified.

as to what she needed to do to preserve her private right of action. At most, the failure of the Department to do so was a simple oversight by a busy government official, which Mrs. Dartt could have easily remedied herself if she had made a reasonable inquiry as to what was necessary to preserve her rights. Moreover, even if the Department wrongfully failed to inform Mrs. Dartt of the Section 626(d) requirements, Shell cannot be held liable for the omissions of the Department. Actions of a third party, not in privity with a defendant, have traditionally been held to be insufficient to warrant a tolling of a statute of limitations.[37]

It was never alleged that Mrs. Dartt was under any legal disability which prevented her from filing suit, nor, as will be subsequently discussed, was she otherwise prevented from doing so by matters beyond her control. Thus, this is a classic case for the application of the well-settled law on the effect of ignorance upon a statute of limitations. It has been said:

[37] See, e.g., *Cato v. South Atlantic & Gulf Coast Dist. of Intl. Longshmn. Assn.,* 364 F. Supp. 489, at 493 (S.D. Tex. 1973), affd. per curiam 485 F. 2d 583 (5th Cir. 1973). See also, *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.,* 515 F.2d 1195 (5th Cir. 1975), wherein the Fifth Circuit expressly declined to charge the employer with the derelictions of third parties — the plaintiff's attorneys. Indeed, Congress appears to have foreclosed any reliance by Mrs. Dartt on the omission of the Department of Labor by its incorporation of 29 U.S.C. § 259 into the A.D.E.A. See, e.g., *Hodgson v. Square D Co.,* 459 F.2d 805 (6th Cir. 1972). By expressing what agency actions could be relied upon, Congress excluded actions such as those taken by the agency here.

> It is a well-known maxim, that ignorance of the law will not furnish an excuse for any person, either for a breach, or for an omission of duty; *Ignorantia legis neminem excusat;* and this maxim is equally as much respected in equity as in law. It probably belongs to some of the earliest rudiments of English jurisprudence; and is certainly so old, as to have been long laid up among its settled principles.[38]

Nor does it make any difference that Mrs. Dartt may have been mistaken as to the remedies available to her. As this Court stated in *Willard v. Wood,* 164 U.S. 502 at 523 (1896):

> The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes non-suit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred.

Likewise, it is of no importance that Mrs. Dartt may have been ignorant of her rights due to her lack of education or mental acuity. As one commentator stated:

> The court cannot undertake to estimate the chance, which the state of mind and education of a man may afford of his making such a discovery, and it is therefore compelled to assume that every one, not actually a lunatic, is competent to judge of and to obtain

[38] 1 J. STORY, EQUITY JURISPRUDENCE 108, 109 (11th Ed. 1873). *See also, North Laramie Land Co. v. Hoffman,* 268 U.S. 276, at 283 (1925).

> advice concerning his rights, and to assert them if necessary.[39]

Here, Mrs. Dartt was put on notice of the existence of the A.D.E.A. by the posters displayed by Shell throughout its facilities. She already had presumptive knowledge of the existence of that statute and its provisions. She then consulted an attorney, who told her that she did not need an attorney "at that time" (A. 48). Thereafter, Mrs. Dartt went to the Department of Labor, and admitted that she never asked any questions whatsoever as to what her rights were or what procedures she needed to follow to preserve her rights.

Mrs. Dartt must be found to have had sufficient notice of the statute, and of the provisions of Section 626(d). As this Court held in *Wood v. Carpenter,* 101 U.S. 135, at 141 (1879):

> 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' *Kennedy v. Greene,* 3 Myl. & K. 722.

It is clear that Mrs. Dartt's attention was "excited" to possible violations of her rights under the A.D.E.A. It is further clear that, in her own mind, Mrs. Dartt believed that the facts were sufficient to cause her to start an inquiry as to her rights under the A.D.E.A. It is finally clear that,

[39] 1 J. STORY, EQUITY JURISPRUDENCE 856 (11th Ed. 1873).

had she continued her inquiry, she would have discovered the existence of Section 626(d). Because a reasonable inquiry would have led her to discover her rights, this Court should not excuse her failure to make such an inquiry.[40]

Shell submits that this Court should eschew any inquiry into the facts of each case, to determine whether a particular plaintiff either had actual knowledge of Section 626(d) or would have obtained such knowledge upon a reasonable inquiry. To adopt such a rule would enmesh the district courts in a hopeless quagmire and unduly prolong A.D.E.A. litigation. Indeed, this case presents a good example of the differing standards which would result from the application of such a rule, as the District Court and the Court of Appeals reached diametrically opposed conclusions as to the reasonableness of the inquiry by Mrs. Dartt and the relative equities in her favor. Moreover, it is significant that this Court deemed it unnecessary to make any inquiry into the knowledge by a Title VII plaintiff of the 180-day charging requirement, in holding that such requirement must be strictly applied. *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). Notably, the Title VII poster, like the A.D.E.A. poster, fails to mention time limitations (Pet. App. 41a, 45a). There is no legitimate reason to

[40] *Wood v. Carpenter, supra; Stearns v. Page,* 7 How. 819, 48 U.S. 418 (1848); *Hardt v. Heidweyer,* 152 U.S. 547 (1894); *Gordon v. Kimmell,* 99 U.S. 201 (1878).

excuse A.D.E.A. plaintiffs from presumptive knowledge of the provisions of the Act, when plaintiffs under equally remedial statutes are charged with presumptive knowledge of the provisions of such statutes.

In any event, even assuming *arguendo* that this Court were to permit tolling of the 180-day notice period under certain circumstances, the indefinite tolling permitted by the Court of Appeals is clearly impermissible. Even under the most egregious circumstances, such as fraud, this Court has consistently held that the statute of limitations is not tolled indefinitely. Rather, the statute begins to run again when the plaintiff actually learns, or reasonably should have learned, of the fraud.[41]

Therefore, assuming *arguendo* that the 180-day notice period may be tolled due to ignorance of the requirement, this Court must follow established legal precedent and rule that the notice period begins to run again when the plaintiff acquires the means of knowledge of the Section 626(d) requirement. Here, Mrs. Dartt acquired the means of knowledge of the requirement when she consulted her first attorney and the Department of Labor on or before August 9, 1973. As a result, the 180-day limitations period began to run again at that point, and expired some 27 days before her notice was filed. Therefore, the District Court

[41] *Hardt v. Heidweyer,* 152 U.S. 547 (1894); *Stearns v. Page,* 7 How. 819, 48 U.S. 418 (1848); *Wood v. Carpenter,* 101 U.S. 135 (1879). *See also, Developments In The Law, Statutes of Limitations,* 63 HARV. L. REV. 1177, at 1220 (1950).

properly dismissed her action, and its decision should be affirmed.

B. Legal Precedent Establishes That A Limitations Period Is Not Tolled Through The Use Of Separate, Alternative Remedies.

The District Court found that, under the A.D.E.A., there are two separate and distinct enforcement mechanisms. Under the first enforcement mechanism, a complainant may go to the Department of Labor at any time within the applicable statute of limitations and register a complaint of age discrimination. The complainant places full reliance on the Department of Labor to protect his or her rights, and is bound by any settlement reached by the Department.

Under the second enforcement mechanism, the complainant invokes an entirely different procedure. All that this person must do to be able to bring a private action is to file a Notice of Intent to Sue within 180 days after the alleged violation, and then afford the Department a period of sixty days in which to mediate the dispute. This complainant need never invoke the first enforcement mechanism and, unlike one who invokes the first enforcement mechanism, is free to reject any proposed settlement by the Department of his case.

The District Court found that a complainant who wishes to bring a private A.D.E.A. action is not required to invoke the first enforcement mechanism, and one who

does so is seeking a permissive administrative remedy (A. 19, 20). The District Court therefore followed a long line of cases holding that pursuit of a permissive remedy does not toll a limitations period,[42] and refused to toll the Section 626(d) notice period based upon the resort by Mrs. Dartt to the first enforcement mechanism.

The reasoning of the District Court is persuasive, and should be followed by this Court. This case is closely analogous to the situations recently presented to this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) and in *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). The plaintiff in *Johnson* had two separate and distinct remedies for racial discrimination, one under Title VII and one under 42 U.S.C. § 1981. The plaintiff in *Robbins* likewise had two separate and distinct remedies for racial discrimination, one under Title VII and one under the grievance-arbitration machinery of a collective bargaining agreement.

The plaintiffs in both *Johnson* and *Robbins* argued vigorously that their pursuit of one remedy should toll the time limitations for pursuit of the alternative remedy. In *Johnson*, this Court held that the fundamental answer to the issue of tolling was whether the plaintiff had "an unfettered right" to pursue either remedy (95 S. Ct. at

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[42] *Steel Improvement & Forge Co. v. U.S.*, 355 F.2d 627 (Ct. Cl. 1966); *O'Callahan v. U.S.*, 451 F.2d 1390 (Ct. Cl. 1971). *See also, Comacho v. U.S.*, 494 F.2d 1363, at 1369 (Ct. Cl. 1974); *Soriano v. U.S.*, 352 U.S. 270 (1957).

1723). In *Robbins*, this Court reiterated its views expressed in *Johnson* that no tolling was permissible where the plaintiff was not "prevented from asserting" her alternative claim (97 S. Ct. at 447, n. 10).

Here, Mrs. Dartt had an unfettered right to pursue either her administrative or judicial remedies. Her oral complaint was neither required as a condition precedent to filing a Notice of Intent to Sue, nor did such complaint bar Mrs. Dartt from timely compliance with Section 626(d). Mrs. Dartt made a conscious decision not to hire an attorney and inquire into her rights, stating:

> I thought the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney (A. 44).

Thus, Mrs. Dartt is in the precise situation as the plaintiff in *Johnson*, who placed his faith in EEOC resolution of his charge, and slept on his independent judicial remedy under 42 U.S.C. § 1981. This Court should reach the same conclusion which it reached in *Johnson*, that: "The fact that his slumber may have been induced by faith in his Title VII remedy is of little relevance, inasmuch as the two remedies are truly independent." (95 S. Ct. at 1723).

Indeed, one of the principle policy arguments present in *Johnson* is not present in the instant case. In *Johnson*, the plaintiff argued that pursuit of his § 1981 remedy

would force him into premature litigation, and frustrate the national policy in favor of conciliation of racial discrimination complaints. Here, there is no similar negative result by the pursuit of both the administrative and judicial remedies available to a private plaintiff under the A.D.E.A. Once having filed a Notice of Intent to Sue to preserve his judicial remedy, an A.D.E.A. plaintiff may continue to pursue his administrative remedies and select the time when suit will be filed (subject to the statute of limitations contained in 29 U.S.C. § 255).[43]

Congress could have, as Senator Javits proposed,[44] allowed the preservation of both the administrative and judicial remedies of a complainant by the simple filing of a charge. It did not do so. Instead, Congress only allowed a limited extension of time for the preservation of the judicial remedy in cases where a complainant filed a charge with a state agency. Congress, of course, could have made this same extension of time applicable to situations where charges were registered with the Department of Labor. Because it did not, this Court ought not engraft an extension of time onto Section 626(d)(1).[45]

To hold otherwise would fly in the face of the well-

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[43] It is noteworthy that, under the F.L.S.A., the making of a complaint to the Labor Department does not toll the statute of limitations period, set forth in 29 U.S.C. § 255, for the filing of a private suit. *Shandelman v. Schuman*, 92 F. Supp. 334 (E.D. Pa. 1950).

[44] 113 CONG. REC. 7077.

[45] Cf. *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441, at 449 (1976).

settled principle that pursuit of permissive remedies does not warrant any tolling and would, in a very real sense, require this Court "to read the notice section out of the statute."[46]

C. The Weight Of Authority Establishes That A Limitations Period May Not Be Tolled Where Alternative Actions By A Plaintiff Fail To Convey Proper Statutory Notice Of Suit.

Mrs. Dartt argues that her oral complaint to the Department of Labor, within nine days after her discharge, put Shell on notice that she was pursuing her A.D.E.A. rights, and such oral complaint was sufficient to toll the 180-day limitations period for filing a written notice of intent to sue. She argues that the purposes of Section 626 (d) were satisfied by her oral complaint, and that this case is, therefore, controlled by the decision of this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965).

Shell submits that the reliance by Mrs. Dartt upon *Burnett* is misplaced, for two reasons. First, *Burnett* dealt with an ordinary statute of limitations, rather than with a jurisdictional prerequisite. As was previously discussed, tolling principles applicable to statutes of limitations do not apply to jurisdictional prerequisites.

Secondly, even if *Burnett* did apply to the Section 626(d) limitation period, that case is more helpful to Shell than to Mrs. Dartt. In *Burnett*, the defendant was timely

[46] *Powell v. Southwestern Bell Telephone Co., supra,* 494 F.2d at 490.

and properly given notice of the lawsuit by plaintiff through service of process made in accordance with the statute. There was no defect in the notice given; rather, the only defect was in venue. Because the defendant in *Burnett* had received timely and proper notice of the lawsuit by the plaintiff, this Court found that tolling should be allowed.

Here, it is undisputed that Shell never received any timely notice that Mrs. Dartt intended to file a civil action against it. Thus, Shell is in an analogous position to the employers in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). In those cases, this Court held that *Burnett* was inapplicable to situations where the employer did not receive notice, in the manner contemplated by the statute, that the plaintiff intended to bring suit against it under a particular statute.

A close reading of *Burnett*, *Johnson* and *Robbins & Myers* yields the conclusion that the central question in deciding whether any tolling is permissible is whether the defendant received the notice which Congress intended it to receive as to the claim.[47]

[47] Closely related, but logically separate, is the line of cases previously discussed, which refuses to allow any tolling while a plaintiff pursues permissive administrative remedies. Those cases hold that, if there is no legal impediment to assertion of a cause of action in a particular forum, a plaintiff has no claim on equity if he fails to pursue it.

Shell submits that the clear language of Section 626(d) requires that a defendant receive actual notice that a plaintiff intends to file a civil action against it. As was noted previously, Congress believed that early notice of an impending private lawsuit was essential to the enforcement scheme of the A.D.E.A. Such notice gives an employer added incentive to engage in conciliation, because failure of conciliation will result in expensive litigation. The short sixty-day conciliation period further adds a sense of urgency to settlement discussions, and the Department of Labor is required to actively pursue all settlement possibilities.

An oral complaint to the Department of Labor does not give an employer any notice that the complainant intends to sue it. At most, it notifies the employer that, if the Department of Labor finds merit to the complaint and if the Department of Labor believes that the evidence is sufficient to institute suit, the Department of Labor may decide to file suit. There is no companion sense of urgency to resolve oral complaints at their early stages, because the employer does not face an immediate lawsuit.

Thus, in a very real sense, the employer is prejudiced when it is deprived of the early knowledge that a private suit is to be brought against it, because it is deprived of the early opportunity to make an informed business decision as to whether settlement is advisable. As a result, where the employer is deprived of the thrust of the strong

negative impetus of an impending lawsuit while other factors favoring speedy settlement are at their optimum,[48] the Congressional purpose of promoting settlement of private suits is thwarted.

The Court of Appeals erred in finding that the oral complaint by Mrs. Dartt fulfilled the *de facto* purposes of Section 626(d). Such a complaint neither gives the employer any notice that it will be sued, nor does it fulfill the statutory purposes behind such requirement.[49] The other circuits ruling on this issue, as well as several district courts, have repeatedly found that a mere oral complaint to the Department of Labor is insufficient to satisfy the requirement, or to toll the time for meeting the requirement. Thus, in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), the plaintiff registered an oral complaint to the Department of Labor within the 180 day period, but failed to file a notice of intent to sue until after the 180 days had expired. The plaintiff argued that her oral complaint, together with the informal action on her behalf by the agency, was sufficient to satisfy or, at least, toll the notice period. The Fifth Circuit disagreed,

[48] i.e., small backpay, no need to discharge replacements, etc.

[49] The Court of Appeals appears to have tacitly admitted that Dartt's oral complaint did not convey the required notice when it stated, "To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act." (A. 29).

and dismissed her action, stating: "To consider informal action by the Secretary in her behalf as tolling the 180 day requirement would be to read the notice section out of the statute, an action we are not prepared to take." (494 F.2d at 490).

Similarly, in *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976), the Fifth Circuit reiterated its view that an oral complaint to the Department of Labor "is not the same as filing a notice of intent to bring a civil court action." (531 F.2d at 1312).[50] Likewise, in *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit held that an oral complaint to the Labor Department "does not constitute notice of intent to sue as mandated by the statute," citing with approval the decision by the District Court in the instant case (521 F.2d at 634).[51]

In addition to the clear statutory language and the virtual unanimity of the decisions of the courts, indicating that a mere oral complaint cannot satisfy Section 626(d),

[50] *See also Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), wherein direct notice by a private attorney to the employer of possible suit did not satisfy or toll the notice requirement, because such notice was not also timely furnished to the Department of Labor.

[51] *See also, Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D. Conn. 1976); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Grossfield v. W. B. Saunders Co.*, ___ F. Supp. ___, 1 FEP Cases 624 (S.D. N.Y. 1968); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D. Conn. 1975).

there are two other factors which support the contention by Shell that the *de facto* purposes of Section 626(d) were not met by Mrs. Dartt's oral complaint. The first is the interpretation by the Department of Labor as to what type of notice satisfies Section 626(d), and the second is the actions taken by the Department in the instant case.

In an administrative opinion letter issued by Assistant Secretary of Labor Donahue on August 26, 1968, setting forth the requirements for compliance with Section 626(d), the Department stated:

> No particular form is necessary in order to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. However, such notice should be provided in writing and properly addressed to the Department of Labor.[52]

Thus, it is apparent that the Department of Labor requires that it receive a written notice evidencing an intent to sue before it sets in motion its conciliation functions and its analysis of the case as one for intervention or preemptive suit.[53] In the instant case, the Department of Labor obviously did not consider the oral complaint by Mrs. Dartt as satisfying the requirements of Section 626(d), stating to her in a letter:

> The fact that you submitted information concerning an alleged unlawful practice has not been considered

[52] FEP Manual 401:5213.

[53] This administrative interpretation is entitled to "great deference." Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, at 435 (1971).

a notice to the Secretary of Labor of intent to file suit (A. 69).

In addition, the actions by the Department of Labor in the instant case belie any conclusion that the administrative processing of Mrs. Dartt's oral complaint satisfied the *de facto* purposes of Section 626(d). The preliminary "conciliation" was nothing more than an inquiry as to whether Shell wanted to settle (A. 81, 82), which seems far short of the concerted conciliation efforts which the statute requires of the Department of Labor.[34] Moreover, prior to the receipt of the written notice filed by Mrs. Dartt, the Department not only did not inform Shell that Mrs. Dartt was intending to sue, but affirmatively told Shell that she had not filed a notice of intent to sue (A. 50). Finally, when the Department did receive the written notice from Mrs. Dartt, it did not rely on its prior contacts with Shell as fulfilling either the notice or conciliation functions prescribed by Section 626(d). Instead, it gave Shell written notice of Mrs. Dartt's intended suit, and began to vigorously pursue possible settlement.

Thus, neither the statute, relevant legal precedent, the official administrative interpretation of the requirements of Section 626(d), nor the facts support the conclusion that Shell received the type of notice contemplated by Section 626(d). This being true, the *Burnett* tolling principle is inapplicable to this case.

[34] Cf. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

III.

COURTS OF APPEAL ARE PROHIBITED FROM SUBSTITUTING THEIR JUDGMENT FOR THE EQUITABLE DISCRETION OF A DISTRICT COURT

The District Court found that Mrs. Dartt did not act reasonably in failing to inquire into what she needed to do in order to protect her rights under the A.D.E.A. The District Court further found that the interests of Shell and the Department of Labor were necessarily prejudiced where no timely Section 626(d) notice is given. Weighing all of these factors, the District Court concluded that it would be "just" to leave Mrs. Dartt to her administrative remedy before the Department of Labor.

The Court of Appeals reached diametrically opposed conclusions from the same set of facts. In the view of the Court of Appeals, Mrs. Dartt acted reasonably in pursuing her rights under the A.D.E.A. and was excusably ignorant of the Section 626(d) requirement. The Court of Appeals further found that the interests of Shell and the Department of Labor were not prejudiced by the failure of Mrs. Dartt to give timely notice of her intention to maintain a private action. The Courts of Appeals therefore concluded that it would be equitable to allow Mrs. Dartt to maintain her private action.

Assuming *arguendo* that equitable considerations come into play in the instant case, it is well-settled that

the exercise of these equitable powers is committed to the sound discretion of the district courts.[55] The review powers of the Courts of Appeals, and of this Court, are "correspondingly narrow,"[56] and are limited to the question of "whether there has been an abuse of discretion."[57] This Court has repeatedly held that the Courts of Appeals may not engage in a *de novo* review of the record and "give the facts another construction, resolve ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."[58] This Court had defined the proper exercise of discretion as follows:

> The term "discretion" denotes the absence of a hard and fast rule. [citation omitted] When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.[59]

Here, the District Court carefully weighed all of the circumstances, including the fact that Mrs. Dartt could

[55] *Burns v. U.S.*, 287 U.S. 216 (1932); *Swann v. Charlotte-Mechlenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

[56] *Lemon, supra*, 411 U.S. at 200.

[57] *Burns, supra*, 287 U.S. at 223.

[58] *U.S. v. National Assn. of Real Estate Bds.*, 339 U.S. 485, at 495 (1950); *U.S. v. Oregon State Med. Soc.*, 343 U.S. 326 (1952); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, at 123 (1969).

[59] *Langnes v. Green*, 282 U.S. 531, at 541 (1931).

still avail herself of the services of the Department of Labor in the investigation and possible litigation of her case. In the exercise of its sound discretion, the District Court properly concluded that the just result under the circumstances would be to leave Mrs. Dartt to the remedy which she had elected to pursue. Such a result gave full effect to the language of the statute; prevented any possible prejudice to Shell or the Department of Labor by virtue of the untimely notice; and did not deprive Mrs. Dartt of a congressionally-approved remedy for her alleged wrongs.

It cannot be said that the District Court abused its discretion, or failed to give due regard to both the f... and the law, nor can it be said that the result which it reached was unjust. The Court of Appeals, in fact, made no finding that the District Court abused its discretion. Instead, the Court of Appeals engaged in an impermissible *de novo* review of the record, construed the facts differently, and found to be sinister facts which the District Court considered innocent.[60]

This Court should adhere to established principles of appellate review, and reverse the decision of the Court of Appeals for failure to accord proper weight to the findings and conclusions of the District Court.

[60] *U.S. v. National Assn. of Real Estate Bds.*, 339 U.S. 485, at 495 (1950). See, e.g., the implicit suggestion that Shell delayed unreasonably in providing requested information to the Department and thereby caused Mr. Speer to delay informing Mrs. Dartt of the notice requirement (A. 35).

CONCLUSION

Based upon the foregoing authorities and arguments, and the record as a whole, it is respectfully submitted that the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

TEXT OF SECTION 626(d), CONTAINED IN S. 830, AS REPORTED OUT BY COMMITTEE, 113 CONG. REC., 31248, 31249

(d) No civil action may be commended by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 13(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by the informal methods of conciliation, conference, and persuasion.

APPENDIX B

TEXT OF SECTION 626(d), CONTAINED IN H.R. 13054, AS REPORTED OUT BY COMMITTEE, 113 CONG. REC., 34739

(d) No civil action may be commenced by any person under this section until the person has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving such notice, the Secretary shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

APPENDIX C

TEXT OF SENATE AMENDMENTS TO S. 830, AFTER INITIAL PASSAGE BY THE HOUSE, 113 CONG. REC. 35055

On page 8, beginning with line 21 and continuing through line 2 on page 9, strike all of subsection (d), and substitute in lieu thereof the following:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

"(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

"(2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

On page 9, beginning with line 3 and continuing through line 2 on page 10, strike all of subsection (e) and substitute in lieu thereof the following:

"(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act."

On page 10, line 10, strike the word "The" after "Sec. 9." and insert in lieu thereof the following:

"In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the".

On page 17, line 5, strike the word "sums" and insert in lieu thereof the following: "sums, not in excess of $3,000,000 for any fiscal year,"

APPENDIX D

TEXT OF SECTION 7 OF PROPOSED AMENDMENTS BY SENATOR JAVITS TO S. 830, WHILE IN COMMITTEE, 113 CONG. REC. 7077

"LIABILITY

"Sec. 7.(a) Any person who violates the provisions of section 4 of this Act shall be liable to any employee or applicant for employment affected in the amount of the compensation which would have been paid to him had no violation of this Act occurred, and in the case of willful violation of this Act, in an additional equal amount as liquidated damages. An action to recover such liability and for such equitable relief as may be appropriate, including, without limitation, a judgment compelling reinstatement, promotion, or hiring, may be maintained in any court of competent jurisdiction by any one or more employees or applicants for employment for and in behalf of himself or themselves and other employees or applicants for employment similarly situated. But no such action shall be commenced by or on behalf of any employee or applicant for employment until 60 days after a charge relating to the unlawful acts upon which the action is based has been filed with the Secretary by or on behalf of such employee or applicant for employment. No employee or applicant for employment shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The right provided by this subsection of an employee or applicant for employment to bring or join in an action shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 8,

but only to the extent of the relief sought on behalf of such employee or applicant for employment in such action.

"(b) In any action brought under this section the court shall allow to the plaintiff, if the prevailing party, reasonable attorney's fees as part of the costs.

"(c) Any action authorized by this section may be commenced within 2 years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued. Any such action not commenced within the period authorized by this section shall be forever barred.